THE HON'BLE SRI JUSTICE BILAL NAZKI

AND

THE HON'BLE SRI JUSTICE G.CHANDRAIAH

WRIT PETITION No. 13493 OF 2005

Date : 28-01-2006

Between:

4G Informatics (P) Limited, Banjara Hills, Hyderabad, rep. by its President & CEO.

.....Petitioner

and

The State of Andhra Pradesh, rep. by its Secretary, Food and Civil Supplies Department & Others.

.....Respondents

For the petitioner : MR.NUTY RAMA MOHAN RAO

For the Respondents : THE ADVOCATE-GENERAL AND MR.V.R.AVULA

< Gist:

> Head Note:

? CITATIONS:

1. (2000) 2 SCC 617

2. (1979) 3 SCC 489

3. (1981) 1 SCC 568

4. (1985) 1 SCC 260

5. (1994) 6 SCC 651

6. (1997) 1 SCC 134

7. (1999) 1 SCC 492

8. (2004) 4 SCC 19

9. (1997) 1 SCC 301

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ORDER : (Per Hon'ble Sri Bilal Nazki, J)

This writ petition has been filed by the petitioner-Company seeking a relief that the 4th respondent's bid for procurement of State-wide Iris Licenses, was incomplete and respondent Nos.1 to 3 should not consider his bid, as respondent No.4 was unqualified.

The petitioner Company has approached this Court through its Chief Executive Officer Dr.Srinivasa Rao, who has also filed affidavit in support of the writ petition. He contends that he was a Doctor and has specialization in M.R.C.S. Vascular Surgery from Royal College of Surgeons, Edinborough, United Kingdom. He had worked as Surgeon in one of the medical institutes. The petitioner-Company was a Limited Company, having its registered office in Hyderabad. According to the petitioner, the petitioner-Company is sole and

authorized representative of Iridian Technologies, Inc. (Iridian) 1245 N Church Street, Moorsetown, New Jersey, USA (hereinafter referred to as 'Iridian Technologies'). Iridian Technologies developed for commercial utilization software technology for Iris Recognition. Iris Recognition is considered to be the most accurate Biometric Identifier. The holder of US and International Patents behind Iris Recognition Technologies, Iridian offers unparalleled security for public-use applications such as simplified passenger travel, border control, National IDs, restricted access and information access solutions. A detailed development of "Iris Recognition" has been mentioned in the petition and it is stated that Professor Dr.John Daugman, University of Cambridge, United Kingdom was the pioneer of the technology. In 1994, Dr.John Daugman was awarded the patent for the Iris Recognition Algorithms. This is the Parent Intellectual Property for all the products viz., KnoWho Authentication Server, KnoWho OEM SDK (Software Development Kit), PC Iris and Engine Access Control System of Iriscan. Dr. John Daugman, through an assignment deed dated 9.9.1993, conferred right, title and interest in and to the Biometric Personal Identification System based on Iris Analysis on Iriscan Inc., upon the Delaware Corporation. This Iris Authentication Software Technologies developed by Iris scan in due course are as follows –

KnoWho Authentication Server,

KnoWho OEM SDK (Software Development Kit),

Private ID

In the year 2000, Iriscan merged with its Licensee Sensar, Inc. Upon merger, the Company came to be known as Iridian Technologies Inc. As a result, Iridian Technologies is the exclusive possessor and intellectual property patent holder of Iris Licenses and Iris Equipment in the United States of America and International Patents. It is submitted that as on today, the Iridian Technologies possess exclusive patent rights as regards the patents which are subject matter of the writ petition and no one else can sell or use the

technology/software and use license except under a valid license or contract from Iridian Technologies. Through a business agreement dated 5.2.2004, writ petitioner was granted the status of an authorized agency to develop, represent and commercialise Iridian Technologies Software in India. According to the petitioner, it has been the consistent stand of Iridian Technologies that the petitioner is the only Company in India to represent Iridian Technologies for its products, software and user licenses etc. There had been a contract between Iridian Technologies and LG Electronics, USA, for operation, distribution etc. The said business arrangement between Iridian Technologies and LG Electronics, USA, had been validly cancelled on 23.8.2004 by Iridian Technologies. The suit by LG Electronics against the termination of contract, is subject matter of a Suit in the District Court, New Jersy in United States of America. No order has been passed against Iridian Technologies, by the Court at United States. In view of the termination of the contract by Iridian Technologies, LG Electronics, USA, is barred from conducting business in any of Iris User Licenses, Iris Equipment, Software, allied products etc. The State Government, in order to check misuse and fraudulent ration cards used for Public Distribution System of essential commodities, was considering various options to make the Public Distribution System through cards, which can neither be manipulated nor duplicated. According to the petitioner, two technologies were considered – one being fingerprinting, the other being Iris Recognition.

The Government started a pilot project study for Iris Recognition in the Kapra Municipality, through the petitioner. The Project Report was placed before a High Power Committee. State Government decided to adopt Iris Licenses and Iris Equipment for issuance of household ration cards to the eligible families, using Iris Recognition Technology. It is submitted that on 15.4.2005, petitioner, as the sole representative of Iridian Technologies, proposed to supply Iris Licenses and Iris Equipment with latest equipment to the Government of Andhra Pradesh for issuance of household ration cards. Through

its letter dated 30.4.2005, the petitioner offered its terms for supply of complete technology solutions on Iris Personal Identification to the cardholders in the State. The pilot project which had been entrusted to the petitioner for the Kapra Municipality, had been completed by him successfully. After this report, the Government of Andhra Pradesh, through various press reports, according to the petitioner, confirmed that the award of the contract for procurement of Iris Licenses and Iris Equipment will be given to the petitioner-Company. The rates, at which the Government was proposing to give the work to the petitioner-Company, were also disclosed. The 3rd respondent, on 21.5.2005, issued request for proposals for procurement of State-wide Iris Licenses and Iris Equipment for Government of Andhra Pradesh, Hyderabad. The technical and commercial bids had to be submitted on or before 26.5.2005. The respondent Nos.1 to 3, however, cancelled these bids through a letter, dated 4.6.2005. They called upon the petitioner to submit its proposals afresh on or before 10.6.2005. However, the RFP dated 21.5.2005 remained unchanged. The bids were considered in terms of the said RFP. Initially, the 4th respondent submitted its proposals for Finger Print Technology, but in view of the fact that the Government had accepted that it will take recourse to Iris Recognition Technology, the 4th respondent's proposal for Finger Print Technology, was rejected.

In the light of these submissions, it is the case of the petitioner that respondent No.4, who also gave his bid, was not qualified to be considered, as he did not possess the pre-requisite criteria.

The main dispute revolves around the controversy as to whether respondent No.4 could be given license for technology and equipment for which the petitioner had the sole right from the principal i.e. Iridian Technologies.

The terms and conditions of pre-qualification criteria, which need to be gone into, are given in the writ petition as follows –

1. In case the bid is from an authorized dealer, authorization letter from the manufacturer.

2. In case the Iris technology proposed to be deployed by the bidder are governed by patented IPR, the details of all relevant patents viz., patent number, patented date etc.

2.4 A declaration from the manufacturer/technology provider for the support of proposed Iris solution (SDK/API) and technology.

2.5 A declaration from the technology (Iris Software license) provider indicating various brands and models of equipment that are compatible with the technology.

Under 5.1.9.1, bidding procedure is laid down. It is stated that at this stage, APTS will evaluate the technical strengths of the bidder and equipment. The bidders are supposed to file various documents, which are –

a. In case the bid is from an authorized dealer, authorization letter from the manufacturer.

b. In case the Iris technology proposed to be deployed by the bidder are governed by patented IPR, the details of all relevant patents viz., patent number, patented date etc.

c. A declaration from the manufacturer of the equipment in support of compatibility of the equipment with known Iris technologies.

d. A declaration from the manufacturer/technology provider for the support of proposed Iris solutions (SDK/API) and technology.

e. A declaration from the technology (Ins Software license) provider indicating various brands and models of

equipment that are compatible with the technology.

f. Client references regarding successful implementation of offered technology/equipment.

g. A successful demonstration of technology and equipment, if called upon to do.

h. Sample agreement for transferring Iris Licenses.

i. Bidder's commitment to the project and transfer of technology.

j. Technical specifications of the equipment proposed along with assured daily production of the proposed equipment at the Designated Photography Location.

k. Manpower deployment plan along with CV's key staff committed for this assignment.

l. Issues and Risks in the implementation of the Project.

Under 5.4.6, evaluation of technical bids has to be done in two stages –

1. Firstly, the documentation furnished by the Bidder will be examined [prima facie to see if the offer made, technical skill base and financial capacity and other Bidder attributes claimed therein are consistent with the needs of this project.

2. In the second step, APTS may ask Bidder(s) for additional information, visit to Bidders site and/or arrange discussions with their professional, technical faculties to verify claims made in bid documentation. APTS may also ask the Bidder to give presentation on understanding the project scope, technical and financial strengths, proposed methodology, manpower and infrastructure deployment.

Now, the case of the petitioner is that the Government wanted Iris Software Licenses and these licenses could only be granted by those persons, who were authorized to grant those licenses by Iridian Technologies. It is not disputed that the petitioner has a license from Iridian Technologies, but dispute has been raised with respect to respondent No.4, whether he has a valid license and, as has been mentioned hereinabove, according to the petitioner, respondent No.4 traces its source license to LG Electronics, USA, which had a contract with Iridian Technologies, but which had been terminated.

The only question that needs to be answered is whether respondent No.4 is qualified for the bid in view of the fact that the license granted to LG Electronics by Iridian Technologies had been cancelled.

According to the petitioner, the conditions under pre-qualification criteria and bidding procedure make it clear that there must be an authorization from the manufacturer in order to become eligible, and according to the procedure laid down, the offer of respondent No.4 could have not been considered. Petitioner further states that when he came to know about the attempt of respondent

No.4 to participate in the ongoing bid process, he brought to the notice of respondent No.3 that respondent No.4 was ineligible and the petitioner wrote letters on 14.6.2005, 16.6.2005, 18.6.2005 and 21.6.2005 to the respondents and other officers concerned, including the Chief Secretary of the State. On 8.6.2005, respondent No.3 convened a pre-bid meeting. Respondent No.3, in this meeting, made it clear that bidders must provide Indemnity Bonds to Government of Andhra Pradesh to secure the interests of Government of Andhra Pradesh in legal wrangles between Iridian Technologies and LG Electronics. This was a departure from the bid conditions and encourages infringement of Patented Intellectual Property Rights. It is further stated that LG Electronics has been utilizing and duplicating the Software Solutions provided by Iridian Technologies to it during the currency of the business agreement. But such solutions have now become absolete and cannot have compatibility with the scope of the work referred to by the Government in their bid documents. Iris Technology has reached the 4^{th} generation stage, which the petitioner only is competent to supply, while respondent No.4 can only supply 2^{nd} generation solutions. It is further stated that respondent No.4 has not enclosed any of the valid documents in terms of the applicable clauses on Request For Proposals. During the negotiations, the petitioner revised its prices and quoted the following prices –

1^{st} Phase - 8 million @ 1.74 rupee

2^{nd} Phase - 12 million @ 1.30 rupee

3^{rd} Phase - 20 million @ 1 rupee

4^{th} Phase - 20 million @ 0.43 rupee

5^{th} Phase - 20 million @ 0.43 rupee

By this offer, according to the petitioner, there was no variation in prices between the petitioner and respondent No.4.

Counters have been filed by respondent Nos.3 and 4.

The 3rd respondent, in his counter, stated that the petitioner submitted an unsolicited proposal offering Iridian Technologies and also offered to deploy Panasonic Authenticam Iris Cameras for trying out Iris Technology. During the Pilot run at Kapra, it was found that Panasonic Authenticam was slow and inconvenient and number of Cameras have to be increased to three in a single Designated Photo Location (DPL), thereby Computers which are attached to such Cameras would have to be increased to three Computers and number of persons who man the Computers and Iris Cameras would also have to be increased proportionately. It was also found that in many cases, Panasonic Authenticam had a problem in capturing Iris images and citizens had to keep their eyes wide open and sometimes take the help of another person to get the image captured by Panasonic Authenticam. At the end of the trial, the matter of issue of ration cards was referred to a High Power Committee constituted by the Government. The High Power Committee was to look into the issue of selection of bio-metrics, approval of tenders and issue of necessary guidance to the 3rd respondent and they had to monitor the ration card project. This Committee consisted of Special Chief Secretary to Government, General Administration (Coordination) Department, Principal Secretary to Government, Information and Technology Department, Principal Secretary, Finance (R & E) Department, Special Commissioner, office of Chief Commissioner of Land Administration, Commissioner, Municipal Administration, Managing Director, A.P.T.S., Prof. G.Subba Rao, Director, Institute for Technical Governance and Commissioner of Civil Supplies. The High Power Committee felt that Iris Technology was better than Finger Print Technology and hence decided to go ahead with Iris Technology. As per the procedure, tenders were to be called for finalization of service providers.

It has been contended in the counter that Iris Technology was invented by Professor John Daughman of University of Cambridge. In this technology, picture of Iris i.e. ring around pupil of the eye would be captured through the Iris Camera. This imprint can be verified when a person tries to enroll himself for the second time. This avoids duplication of ration cards, apart from enabling reliable authentication for various purposes. It is further submitted that the 3rd respondent issued request for proposals for procurement of Statewide Iris Licenses and Iris Equipment. Petitioner, along with respondent No.4, submitted their bids. The bid of the petitioner as well as the bid of 4th respondent have been evaluated strictly in accordance with terms and conditions of RFP. It is stated that apart from offering the least cost solution in terms of price of cameras to be deployed in each DPL as well as Software Licenses, the 4th respondent was the only one to offer to supply the cameras substantially within the time frame set by the Government for the entire exercise of issuing new ration cards. It is further stated that apart from quoting a high price for the associated software licenses and for the Cameras that were suitable for the exercise, the petitioner did not meet the time frame set for the exercise. After detailed technical and commercial evaluation, the respondent No.4, a dealer of LG Iris Technologies, was determined to be substantially responsive and adjudged as L1 bidder. L1 bidder offered the solution (licenses and cameras) for Rs.8.02 Crore and the solutions offered by the petitioner were priced from Rs.11.00 Crores to Rs.14.43 Crores. Accordingly, the Letter of Intent was issued in favour of 4th respondent on 16.6.2005. L1 was asked to submit certain documents including the Indemnity Bond by its principal LG Electronics, covering any possible risk to the Government, so that the Purchase Order could be issued. After issuance of Award Notification to the 4th respondent, the petitioner and his principal got an American Law firm to issue a notice to the Chief Secretary and others, advising them that in August 2004, Iridian had terminated its agreement with LG Electronics, which authorized LG to use Iris Technologies, that L.G's use of Iridian Intellectual Property is the subject of litigation

currently pending in the US District Court and if the Government of Andhra Pradesh decided to use LG products, which if found unlicensed Iridian Intellectual property, Iridian Technologies reserves all rights and remedies. It is submitted that respondent No.4 and his principals i.e. LG Electronics have reiterated that the License Agreement that provides LG Electronics with the right to use Iridian Technologies' Iris Recognition Technology remains effective and LG Electronics continues to report and pay royalties to Iridian Technologies under the License Agreement and Iridian Technologies had continued to accept those royalty payments. They also indicated that Iridian Technologies does not appear to have any claim against the Government of Andhra Pradesh, that Iridian Technologies' patents involved in this action are US patents, not Indian patents and LG Electronics had agreed to indemnify the Government of Andhra Pradesh.

It is further submitted that the dispute between Iridian Technologies and LG Electronics in US Courts has nothing to do so far as the respondents are concerned. According to the counter, the petitioner, as well as respondent No.4, have complied with the bid conditions and on overall evaluation of the proposals submitted by them, the respondent No.4 is found to be L1, as his bid proposals are more competitive.

The facts are not even disputed by the respondent No.4 in his counter and it is submitted that Iridian Technologies is the exclusive possessor and Intellectual Property Patent Holder of Iris Licenses and Iris Equipment in the United States of America and International Patents. It is submitted that LG Electronics in USA entered into development, distribution and supply agreement with Iris Scan Inc., which was brought over by Iridian Technologies. It is however, submitted that the business agreement between Iridian Technologies and LG Electronics has not been validly cancelled. In fact, Iridian Technologies terminated the agreement in deviation of the procedure contemplated in Clause 13.7 of the agreement. Therefore, LG Electronics, USA filed a Law Suit before the District Court, USA at

New Jersey. A counter claim has been made by Iridian Technologies and both are pending adjudication. It is further stated that Iridian Technologies has been receiving royalty from LG Electronics for development, distribution and supply of technology in terms of agreement dated 8.8.2000. Even after alleged termination of the said agreement, LG Electronics has been supplying the technology to different departments of USA to the knowledge of the Iridian Technologies. The Court has not passed any restraint order against LG Electronics.

Now, the following arguments have been made by the learned counsel for the petitioner –

That the pre-qualification criteria could not have been altered or amended. He refers, in this connection, to the minutes of the pre-bid meeting, dated 8.6.2005. In our view, these minutes do not change, alter or amend the pre-qualification criteria. The learned Counsel Mr.Nuti Rammohan Rao has placed emphasis on Serial No.1, which lays down, *"The Bidders must provide Indemnity bond protecting GoAP from the legal wrangles between Iridian and LG"*.

Serial Nos.8 and 9 are also referred by the learned counsel.

Serial No.8 reads,

> *"In case the bid is from an authorized dealer, authorization letter from the manufacturer"*.

It was changed to –

> *"In case the bid is from an authorized dealer, authorization letter from the manufacturer of Hardware and Software."*

The No.1 condition only tries to protect the interests of the Government of Andhra Pradesh, whereas the change in Serial No.8 merely clarifies that authorization letter must be from the

manufacturer of hardware and software. If the equipment needed is hardware and software, even under the un-amended condition or unchanged condition, this certificate had to be produced.

Serial No.9 reads,

> *"The bidder must provide necessary drivers/API to store Iris signature and image for both eyes separately."*

It was changed to –

> *"The bidder must provide necessary drivers/API to store Iris signature and Image (in raw format) for both eyes separately."*

Therefore, we do not feel that the pre-qualification criteria had been materially altered and there was no question of notifying the criteria, as is canvassed by the learned counsel for petitioner, because these clarifications were made in the pre-bid meeting and are recorded as minutes of the meeting.

The second argument is that since respondent No.4 was not an authorized dealer, neither was LG through whom respondent No.4 was claiming to be an authorized person to deal with the equipment, therefore, this bid could have not been entertained. In this connection, respondent No.4 as well as respondent No.3 have admitted that there was a contract between Iridian Technologies and LG Electronics up to 2002, which was terminated and a suit is pending before the District Court at the United States of America. It has not been disputed that Iridian Technologies has not obtained any order of restraint from the Court at United States of America, but as a matter of fact, is still accepting the royalty from LG Electronics. Therefore, this dispute between LG Electronics and Iridian Technologies may not have any effect on the rights of the Government of Andhra Pradesh under the agreement.

From the counter affidavit, it is clear that the difference between

two prices had been huge and according to respondent No.4, originally, petitioner had quoted a price which would involve a total project cost of Rs.26 Crores according to the rates given by the petitioner, whereas respondent No.4 had offered the project for Rs. 8 to 9 Crores. Even after the petitioner lowered his rates, still, his rates were Rs.3 Crores more than the rates offered by respondent No.4.

There are some technical aspects also with regard to the use of the equipment and the use of the Cameras. Learned counsel for petitioner wants us to make an exercise into the suitability and compatibility of the Cameras, which are being used by respondent No.4 as against the Cameras being used by the petitioner. A High Power Committee, which had the assistance of experts also, has evaluated the earlier project undertaken by the petitioner voluntarily and also the bids of petitioner and respondent No.4, and they have come to a conclusion that the Cameras being used by the petitioner would not be suitable. On the other hand, the equipment and Cameras that were being used by respondent No.4 would be suitable. We do not consider it appropriate to go into such questions, as we will have to go by the opinion of the High Power Committee, which also had the assistance of experts.

The petitioner has relied on various judgments in support of his contentions. The first judgment is in the case of **Air India Ltd. v. Cochin International Airport Ltd.** There is no quarrel with the principle laid down in this judgment, and in fact, it supports the case of respondents more than that of the petitioner. In para 7, the Supreme Court considered all the judgments till date on the subject of law relating to awarding of contracts by the State, its Corporations, instrumentalities and agencies. The Supreme Court referred to – ***(1) Ramana Dayaram Shetty v. International Airport Authority of India, (2) Fertilizer Corpn. Kamgar Union (Regd.) v. Union of India, (3) CCE v. Dunlop India Ltd., (4) Tata Cellular v. Union of India, (5) Ramniklal N.Bhutta v. State of Maharashtra, And (6) Raunaq International Ltd. v. I.V.R.Construction Ltd.***, and then held –

"The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene."

This judgment lays down the parameters in which the Court can interfere and holds that only when Court comes to a conclusion that overwhelming public interest requires interference, Court should intervene. In the present case, we have not seen any arbitrariness on the part of respondent Nos.1 to 3, but on the other hand, they have come to a conclusion that it was more profitable technically as well as monetarily to award contract to respondent No.4.

The only contention that respondent No.4 was not the authorized person to be given the license of the Iridian Technologies, was taken note of by the Government. They were aware that there was a dispute between LG Electronics and Iridian Technologies and

in order to protect the interest of the Government, they obtained Indemnity Bonds from the principal of the respondent No.4 i.e. LG Electronics.

Another judgment relied upon by the petitioner is **Directorate of Education v. Educomp Datamatics Ltd.** This judgment also, is not of any help to the petitioner. This judgment referred to the **Tata Cellular** case (5 supra) and reproduced the principles deduced in that judgment. It will be profitable to reproduce these principles –

> *"(1) The modern trend points to judicial restraint in administrative action.*
>
> *(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.*
>
> *(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.*
>
> *(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.*
>
> *(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.*
>
> *(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."*

Learned Counsel for petitioner also submitted that since respondent No.4 was supplying the equipment in violation of the International Patents, this Court should stop respondent Nos.1 to 3 from having a

contract with respondent No.4. In this connection, he relies on a judgment in **People's Union for Civil Liberties v. Union of India**. We are not going into this issue at all, because as on today, there is nothing on record to show that respondent No.4 is contravening any law on patents. It is admitted that LG Electronics had an agreement with Iridian Technologies, which has been unilaterally terminated and the matter is pending before a Court at United States of America, therefore, it will be premature at this stage, particularly when Iridian Technologies is accepting royalties from LG Electronics even after termination of the agreement.

For these reasons, the writ petition is dismissed. No order as to costs.

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(BILAL NAZKI, J)

28-01-2006

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(G.CHANDRAIAH, J)

Note: L.R. copies to be marked.

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